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Lawyer Collaboration with Systems of Evil

Roger Williams University School of Law

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A One-day Symposium on Legal Ethics

Lawyer Collaboration with Systems of Evil

Friday, April 16, 1999
ROGER WILLIAMS UNIVERSITY
RALPH R. PAPITTO
SCHOOL OF LAW
Bristol, Rhode Island

Hosted by the *Roger Williams University Law Review*

Underwritten by a generous grant from the Providence, Rhode Island law firm of Decof & Grimm

SYMPOSIUM AGENDA

- 9:00 a.m. **Welcome**
- 9:20-10:15 **Wrong Tomorrow, Wrong Yesterday, But Not Today: On Sliding into Evil with Zeal But without Understanding**
Robert A. Burt, Alexander M. Bickel Professor of Public Law, Yale Law School
- 10:15-11:00 **Thomas R.R. Cobb and the Law of Negro Slavery**
Paul Finkelman, John F. Seiberling Professor of Constitutional Law, University of Akron School of Law
- 11:00-11:15 **Break**
- 11:15-12:00 **Three Lawyers in the "Redemption" of the Old South**
Paul D. Carrington, Harry R. Chadwick Sr. Professor of Law, Duke University School of Law
- 12:00-1:00 **Luncheon**
- 1:00-1:45 **The Risks of Adjudicating Vichy**
Richard H. Weisberg, Walter Floersheimer Professor of Constitutional Law, Benjamin N. Cardozo School of Law
- 1:45-2:30 **The American Death Penalty at Century's End: The Problem of Systemic Injustice**
Robert J. Cottrol, Harold Paul Green Research Professor of Law, George Washington University Law School
- 2:30-2:45 **Break**
- 2:45-3:30 **Lawyer Management of Systems of Evil: The Case of the Tobacco Industry**
Richard A. Daynard, Professor of Law, Northeastern University School of Law
- 3:30-4:00 **Reactions and General Remarks**
Susan P. Koniak, Professor of Law, Boston University School of Law and Visiting Professor of Law, Harvard Law School
- 4:00 **Closing Comments**

SYMPOSIUM FACULTY



Robert A. Burt, Alexander M. Bickel Professor of Public Law, Yale Law School

Professor Burt has been a member of the Yale faculty since 1976 and previously served on the law and medical school faculties at the University of Michigan and the law faculty at the University of Chicago. He has written extensively on biomedical ethics and constitutional law, including *The Constitution in Conflict* (Harvard University Press, 1992), *Two Jewish Justices: Outcasts in the Promised Land* (University of California Press, 1988), and *Taking Care of Strangers: The Rule of Law in Doctor-Patient Relations* (Free Press, 1979). Professor Burt is now at work on a book to be entitled *A Man Going Round Taking Names: The Administration of*

Death in American Law, Medicine and Culture, for which he was awarded a John Simon Guggenheim Fellowship in 1997. He is currently chair of the Board of Trustees of the Judge David L. Bazelon Center for Mental Health Law and a member of the Advisory Board of the Project on Death in America of the Open Society Institute. He received a J.D. degree from Yale University in 1964, a M.A. in Jurisprudence from Oxford University in 1962, and a B.A. from Princeton University in 1960.

Wrong Tomorrow, Wrong Yesterday, But Not Today: On Sliding into Evil with Zeal But without Understanding

Professor Burt will focus on conduct that might be called “unwitting collaboration with evil” – that is, conduct that clearly reveals itself as evil only in retrospect, though with such force and clarity as to make it almost incredible that the evil was not clearly seen as such by the participants. A range of behaviors illustrate this problem: for examples, unconsented medical research where the researchers believe themselves to be “advancing science” and acting in perfect good faith, or unthinking acceptance of racial or gender stereotypes without an understanding of their hurtful and demeaning implications. Consideration of this kind of “unwitting collaboration” will lead Professor Burt to examine the dynamic of what lawyers call the “slippery slope” – that is, why and how it is that seemingly unobjectionable (and even avowedly admirable) actions can dull one’s moral sensibilities so as to make a downward slide seem easy and justified even though the ultimate destination, if clearly acknowledged at the outset, would have been rejected as wrongful. The transformation of good intentions in the nineteenth-century institutionalization of mentally ill and retarded people into brutal warehousing in the twentieth century is one such example. Are we witnessing the unfolding of a comparable example, as the right to refuse life-prolonging medical treatment is extended through voluntary assisted suicide ultimately to involuntary euthanasia?



Paul D. Carrington, Harry R. Chadwick Sr. Professor of Law, Duke University School of Law

Professor Carrington has taught law since 1957, at one time or another in fifteen different university law schools. His published writings are devoted to civil procedure, judicial administration, public education, legal education, and the history of the legal profession. He was an elected trustee of the Ann Arbor Public Schools and a dean at Duke University School of Law for a decade. Professor Carrington has been involved in diverse activities of the American Bar Foundation, the Federal Judicial Center, the Judicial Conference of the United States, and the Private Adjudication Center. He is a graduate of the University of Texas and Harvard Law School.

Three Lawyers in the “Redemption” of the Old South

Professor Carrington will examine and contrast the late 19th century careers of John Harlan, Lucius Lamar, and Randolph Tucker, each of whom confronted the moral challenge of conducting a public career in a time of widespread moral degradation.

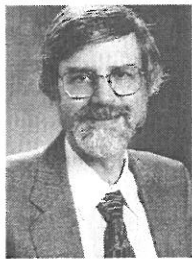


Robert J. Cottrol, Professor of Law and History and Harold Paul Green Research Professor of Law, George Washington University

Professor Cottrol is a distinguished author and lecturer on American legal history, civil rights, and constitutional law. He is the author of *The Afro-Yankees: Providence's Black Community in the Antebellum Era* (Greenwood Press 1982) and an editor of several books on gun control, slavery, and race relations and legal history. Professor Cottrol served on the faculties of Boston College Law School and Rutgers School of Law (Camden) before joining George Washington University in 1995. He received a J.D. from Georgetown University Law Center in 1984, a Ph.D. in American Studies from Yale University in 1978, and an A.B. from Yale in 1971.

The American Death Penalty at Century's End: The Problem of Systemic Injustice

Professor Cottrol will examine the modern death penalty and the role of lawyers and judges in its administration. In the author's view, the application of the death penalty has to be looked at as an egregious example of systemic injustice and indeed evil. Any examination of capital punishment as such an example must develop a notion of injustice distinguishable from policy disagreement, however strong that disagreement may be. Although the author is a long-time opponent of the death penalty, he begins with a review of the argument in support of capital punishment and with the premise that it need not result in systemic injustice. He proceeds to contrast the death penalty supported by capital punishment advocates with the system currently in place in the United States. His argument is that the actual system has such severe problems of inequitable administration, possibility of error, hyper-technicality in the review process, and corruption of the trial process that the problems far outweigh the alleged benefits proclaimed by death penalty supporters.



Richard A. Daynard, Professor of Law, Northeastern University School of Law

An expert on tobacco policy and tobacco products liability litigation, Professor Daynard has authored numerous articles, lectured internationally, and testified before congressional and state legislative committees, administrative agencies, and local governmental bodies. Since 1984, he has served as the President of the Tobacco Control Resource Center and the Chair of the Tobacco Product Liability Project. In addition to serving on the law faculty of Northeastern University, he was for several years an instructor in psychiatry at Tufts New England Medical Center. Professor Daynard earned a Ph.D. in 1980 from M.I.T., a J.D. in 1967 from Harvard, and a A.B. (1964) and M.A. (1970) from Columbia.

Lawyer Management of Systems of Evil: The Case of the Tobacco Industry

Professor Daynard will describe how, unlike systems of evil in which lawyers have played subsidiary roles, the tobacco industry's smoking-and-health disinformation campaign has for several years been managed by a "Committee of Counsel." Their responsibilities have included determining what research will be done (or not done) by company scientists, what outside research will be funded (including by supposedly independent funding agencies), and what statements about smoking and health will be made by company executives. They hid research that showed the dangers of smoking under the attorney-client and work-product privileges, and they failed to produce damaging materials required under court orders. Professor Daynard will assert that the energetic and imaginative contributions of these lawyers have made possible much of the devastation being wrought by tobacco-caused addiction and disease.



Paul Finkelman, John F. Seiberling Professor of Constitutional Law, University of Akron School of Law

Professor Finkelman has written and lectured extensively on constitutional law, American legal history, and slavery. His many books and articles include *Impeachable Offenses: A Documentary History from 1787 to the Present* (Congressional Quarterly); *Slavery and the Founders: Race and Liberty in the Age of Jefferson* (M.E. Sharpe, 1996) and *Dred Scott v. Sanford: A Brief History with Documents* (Bedford Books, 1997). Professor Finkelman has taught in law schools and history departments of several universities, having earned an M.A. (1972) and Ph.D. (1976) from the University of Chicago and a B.A. from Syracuse University. In 1982-83, he was a Fellow in Law and Humanities at Harvard Law School.

Thomas R.R. Cobb and the Law of Negro Slavery

Professor Finkelman's article will focus on Thomas R.R. Cobb, the official reporter for the Georgia Supreme Court and a co-founder of the Lumpkin Law School, which later evolved into the University of Georgia School of Law. Cobb was the central figure in the writing of the Confederate Constitution and the organizer of "Cobb's Legion" before his death in 1862 at the battle of Fredericksburg. Most importantly, Cobb was the author of the only treatise on the law of slavery written by a southerner: *An Inquiry into the Law of Negro Slavery*. Professor Finkelman will explore the way Cobb used "scientific" arguments, scriptural interpretation, legal theory, common law doctrine, and Anglo-American precedent to create a proslavery argument in the form of a treatise which purports to be neutral.



Susan P. Koniak, Professor of Law, Boston University School of Law

Professor Koniak is visiting this academic year at Harvard Law School. She teaches courses on the ethical and legal responsibilities of lawyers and a seminar on problems in class action practice. Professor Koniak is the author, along with Professors Geoffrey C. Hazard, Jr., and Roger C. Cramton, of *The Law and Ethics of Lawyering*, a leading textbook on the legal profession. She has written many articles on the responsibilities of lawyers, abuse in class actions, and the maintenance of norms by private groups and the relationship of those norms to law. She is also an author, along with Robert Cushman and Brian Koukoutchos, of a political science text on constitutional law. She has written several articles on constitutional law as well, including most recently, "Bargaining in the Shadow of Democracy," co-authored by David Dana, on the Contract Clause and its application to government contracts. A graduate of Yale Law School, Professor Koniak has taught courses on the legal profession at many law schools including Cornell, Georgetown, Michigan, and Yale.

Professor Koniak will offer observations on the symposium presentations and general remarks on the broad topic of lawyer collaboration with systems of evil.



Richard H. Weisberg, Walter Floersheimer Professor of Constitutional Law, Benjamin N. Cardozo School of Law

The author of three pioneering books in the field of law and literature, Professor Weisberg has recently published *Vichy Law and the Holocaust in France* (NYU Press 1996). This book is part of the series on "Antisemitism" edited by the Hebrew University in Jerusalem. As a practitioner, Richard Weisberg currently is on the team of lawyers prosecuting the class action lawsuits by Holocaust survivors against various Swiss banks as well as against French banks and insurance companies. Professor Weisberg has been awarded a Guggenheim Fellowship for 1998-99. His research project is entitled "Up From the Privatization of our Public Discourse," an analysis of Americans' urge to gossip. Professor Weisberg is general editor of *Cardozo Studies in Law and Literature*, now in its tenth year of publication. He is the Chair of the Law & Humanities Institute, a New York based organization devoted to making the law more intelligible and humane. Professor Weisberg earned a Ph.D. in Comparative Literature from Cornell (with an M.A. in French Literature), and a J.D. from the Columbia University School of Law.

The Risks of Adjudicating Vichy

Professor Weisberg will discuss how several prominent French criminal procedures (and two full trials), as well as an American federal court case, have recently arisen regarding the treatment of France's Jewish population during the dark period of 1940-44 (the "Vichy" years). To what extent do these events do justice to the actual history of Vichy, or to what extent do they risk distorting the truthful record of France's victimization of Jews, some 76,000 of whom were deported, under color of Vichy law, to the concentration camps "in the East?" If risks are incurred by such litigation, are they in some measure outweighed by the light lawyers may help to throw on this still hidden history? Professor Weisberg will review his recent findings about Vichy and assess the risks of adjudicating it.

The views and opinions expressed by the speakers are their own and do not necessarily represent those of Roger Williams University Ralph R. Papitto School of Law.

GENERAL INFORMATION

CLE/Proctor Points

The *Roger Williams University Law Review* symposium, "Lawyer Collaboration with Systems of Evil," has been approved for six (6) CLE credits by the RI MCLE. Certificates are available from the Registration Desk. Rhode Island attorneys must sign the attendance sheet at the Desk.

Lunch

Conference registration includes the Luncheon today in the Cafeteria. It is on the lower level (down two flights of stairs or to "B" in the elevator). Please present your lunch ticket as you go through the buffet line.

Symposium Articles and Videotapes Available

The symposium presenters will publish their articles in the Fall 1999 issue of the *Roger Williams University Law Review*. If you would like to obtain this issue, you may order it at the *Law Review* table near the registration desk. Videotapes of the conference may also be ordered.

Messages

A message board will be located at the Registration Desk.

No Smoking

Roger Williams University has a no smoking policy in effect within the building.

Phones

There are two public telephones located on the main floor of the School of Law opposite the elevators. There is also a public phone on the ground level at the far side of the cafeteria, through the small hallway near the mail-boxes.

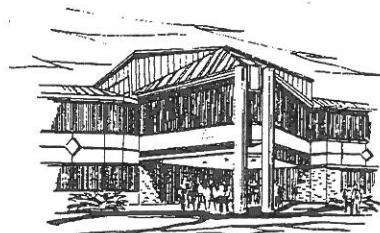
Receipts

You may pick up your credit card receipt at the Registration Desk. If you paid by check or cash, the staff at the Registration Desk can write a receipt for you.

Registration Desk

The Registration Desk will be staffed during symposium hours. Staff will be pleased to assist you wherever possible.

Lawyer Collaboration
with
Systems of Evil



ROGER WILLIAMS UNIVERSITY
RALPH R. PAPITTO
SCHOOL OF LAW
Bristol, Rhode Island

Roger Williams University School of Law offers a challenging education at an institution whose hallmark is excellence.

The four-level law building, designed exclusively for the study of law, contains state-of-the art technology in legal education and is completely self-contained. In addition to the extensive law library, the law building contains class and seminar rooms, a law practice center including trial advocacy and appellate moot court rooms, and all ancillary services.

The School of Law faculty reflects a diversity in experience and expertise. With 26 full-time faculty members, there is a broad range of expertise including admiralty, copyright, international law, labor, products liability, and securities regulation. In addition, 37 adjunct professors expand the curriculum with their expertise.

A significant aspect of the School of Law curriculum is its comprehensive skills training program that enables law students to master those analytical, communicative, and other lawyering skills that facilitate effective legal problem solving. Simulation courses provide practical training in trial advocacy, client interviewing, counseling, and appellate advocacy. The Lawyering Skills Program brings pragmatic application to a solid foundation of legal doctrine.

Roger Williams University School of Law earned full approval from the American Bar Association in February 1997, in the shortest time possible under ABA rules.

The *Roger Williams University Law Review* will publish the papers presented at the *Lawyer Collaboration with Systems of Evil* symposium in its Fall 1999 issue. The Law Review is in its fourth year of publication, producing a spring and fall issue annually. The Fall 1998 issue included papers presented at the Law Review's *Separation of Powers in State Constitutional Law* symposium held in April 1998. In April 2000, the Law Review will host a conference on *Rational Actors or Rational Fools? The Implications of Psychology for Products Liability*, with papers to be published in the Fall 2000 issue. The Law Review devotes its entire spring issue to an annual survey of Rhode Island law, and it welcomes submissions from authors on Rhode Island topics.

The *Roger Williams University Law Review* gratefully acknowledges
the generous grant from

DECOF & GRIMM

whose principal sponsorship is being used to defray conference expenses.

Rational Actors or Rational Fools?

The Implications of Psychology for Products Liability

Roger Williams University School of Law
Friday, April 21, 2000

The law-and-economics movement has had a profound impact on all areas of the law during the last several decades, particularly in the field of products liability. Law-and-economics is premised on the assumption that people are rational actors or "rational maximizers." That is, when they possess adequate information, people act rationally to maximize their own self-interest.

Most legal economists argue that the marketplace works well in supplying consumers with not only products but information. Some believe that because of its complexity and volume, providing consumers with risk information for all of the products they buy is difficult. This group argues that the job of products liability is to increase the price of the product by an amount that reflects the risk factor of the product so that, when contemplating a purchase, the consumer must consider whether the benefit she will derive from the product exceeds the cost of production, the seller's profit, plus the risk of injury.

However, both branches of the mainstream law-and-economics movement share the core belief that people act rationally -- a view that is coming under increasing attack. Conceding that people do not always act rationally, disciples of law-and-economics are starting to turn to cognitive psychology to explain the limits of rational decision-making. They argue that although people are generally rational, there are psychological quirks or "cognitive biases" that disrupt rationality from time to time, and by understanding these biases, law-and-economics can close the loopholes in the grand theory.

This symposium asks: Are consumers, in fact, primarily rational? To what extent do sellers manipulate consumers to make irrational purchases? And what can psychology teach us about the decision-making processes of corporate managers and how the law can encourage such managers to make their products as safe as practicable?

SYMPOSIUM PARTICIPANTS

Professor Martha Elisabeth Chamallas
University of Pittsburgh School of Law

Professor Angelo S. DeNisi
Texas A&M University, Lowry Mays College Graduate School of Business

Professor Baruch Fischhoff
Carnegie Mellon University, Department of Social & Decision Sciences

Professor Jon D. Hanson
Harvard Law School

Professor James A. Henderson
Cornell Law School

Professor Jacob Jacoby
New York University, Leonard N. Stern School of Business

Mr. Douglas A. Kysar
Harvard Law School

Professor Donald C. Langevoort
Vanderbilt University School of Law

Professor Carla Lloyd
Syracuse University, Samuel I. Newhouse School of Communications

Professor Jeffrey L. Rachlinski
Cornell Law School

Professor Paul Slovic
University of Oregon, Department of Psychology